



NATIONAL TRANSPORTATION SAFETY BOARD

49 CFR Part 821

Rules of Practice in Air Safety Proceedings

[Docket No. NTSB-GC-2011-0001]

AGENCY: National Transportation Safety Board (NTSB or Board).

ACTION: Notice of Proposed Rulemaking (NPRM).

SUMMARY: The NTSB proposes amending one of its rules of practice that is applicable to cases proceeding on an emergency timeline. This proposed amendment will require the Federal Aviation Administration (FAA) to provide releasable portions of its enforcement investigative report (EIR) to each respondent in emergency cases.

DATES: Comments must be submitted by [INSERT DATE 30 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: A copy of this NPRM, published in the *Federal Register* (FR), is available for inspection and copying in the NTSB's public reading room, located at 490 L'Enfant Plaza, SW, Washington, D.C. 20594-2003. Alternatively, a copy is available on the government-wide website on regulations at <http://www.regulations.gov> (Docket ID Number NTSB-GC-2011-0001).

FOR FURTHER INFORMATION CONTACT: David Tochen, General Counsel, (202) 314-6080.



SUPPLEMENTARY INFORMATION:

Elsewhere in today's *Federal Register*, the NTSB published a Final Rule, finalizing changes to various sections of 49 CFR part 821, as a result of the Pilot's Bill of Rights. In the final rule, the NTSB, among other things, updated language in § 821.19(d), which requires disclosure of the FAA's EIR in non-emergency cases. Because the Pilot's Bill of Rights was immediately effective upon enactment on August 3, 2012, the NTSB published an interim final rule to implement the new legislation's requirements, 77 FR 63242 (Oct. 16, 2012).

In this NPRM, the NTSB proposes incorporating a similar requirement at paragraph (d) of § 821.55, regarding the release of the EIR in emergency cases proceeding under subpart I of the NTSB's rules of practice. In view of the exigencies presented to certificate holders against whom the Administrator issues emergency orders and the expedited timeframes the Board must observe in adjudicating aviation safety emergency cases, § 821.55(d) will permit relief if the FAA does not provide a copy of the EIR to the respondent in an emergency proceeding by the time the certificate order, as opposed to the complaint, is served on the respondent. This language is set forth in the proposed regulatory text of this rule.



Although in the Pilot's Bill of Rights, Congress required the NTSB to apply the Federal Rules of Civil Procedure and Federal Rules of Evidence to cases within the NTSB's jurisdiction "to the extent practicable," it did not specifically address in the legislation whether the EIR requirement applies to NTSB emergency cases. The NTSB believes such application is appropriate. First, the structurally similar NTSB rules for both emergency and non-emergency proceedings will ensure consistency, which is beneficial for parties and the NTSB's administrative law judges. Parties will benefit from having clear expectations concerning the availability of information at the beginning of each case. In addition, the FAA's compliance with the requirement to provide the EIR at the commencement of each case will not be changed if a respondent waives the applicability of the emergency rules of subpart I.

Applying this disclosure requirement to § 821.55(d) will also require an amendment to § 821.55(c), which currently prohibits motions to dismiss the complaint or motions for a more definite statement of the complaint's allegations. Instead, § 821.55(c) provides "the substance [of such motions] may be stated in the respondent's answer." This preclusion of motions in the early stages of a case is the result of the time constraints applicable to emergency cases. However, given our



proposal to apply the EIR disclosure requirement to emergency cases in § 821.55(d), we also propose amending § 821.55(c) as set forth in the regulatory text of this rule.

The NTSB specifically invites comments concerning § 821.55(c) and (d). The interim final rule, although it included within § 821.19(d) the availability of dismissal on motion in the event the FAA did not timely release the EIR, did not address whether the requirement applied to emergency cases. As a result, the NTSB believes it necessary to allow for comments on the inclusion of this requirement in § 821.55. The NTSB will accept comments for 30 days from the date of publication of this NPRM.

#### Regulatory Analysis

This rule is not a "significant regulatory action" under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of the potential costs and benefits under section 6(a)(3) of that Order. As such, the Office of Management and Budget has not reviewed this rule under Executive Order 12866. Likewise, this rule does not require an analysis under the Unfunded Mandates Reform Act, 2 U.S.C. 1501-1571, or the National Environmental Policy Act, 42 U.S.C. 4321-4347.

In addition, the NTSB has considered whether this rule would have a significant economic impact on a substantial number



of small entities, under the Regulatory Flexibility Act (5 U.S.C. 601-612). The NTSB certifies under 5 U.S.C. 605(b) that this rule would not have a significant economic impact on a substantial number of small entities. Moreover, in accordance with 5 U.S.C. 605(b), the NTSB will submit this certification to the Chief Counsel for Advocacy at the Small Business Administration.

The NTSB does not anticipate this rule will have a substantial, direct effect on state or local governments or will preempt state law; as such, this rule does not have implications for federalism under Executive Order 13132, Federalism. This rule also complies with all applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. In addition, the NTSB has evaluated this rule under: Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights; Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks; Executive Order 13175, Consultation and Coordination with Indian Tribal Governments; Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use; and the National Technology Transfer and Advancement Act, 15 U.S.C. 272 note. The NTSB has concluded that this rule does not



contravene any of the requirements set forth in these Executive Orders or statutes, nor does this rule prompt further consideration with regard to such requirements.

#### **List of Subjects for 49 CFR Part 821**

Administrative practice and procedure, Airmen, Aviation safety.

For the reasons discussed in the preamble, the NTSB proposes to amend 49 CFR part 821 as follows:

#### **PART 821—RULES OF PRACTICE IN AIR SAFETY PROCEEDINGS**

1. The authority citation for 49 CFR part 821 continues to read as follows:

Authority: 49 U.S.C. 1101 - 1155, 44701-44723, 46301, Pub. L. 112-153, unless otherwise noted.

2. In § 821.55, revise paragraphs (c) and (d) to read as follows:

#### **§ 821.55 Complaint, answer to complaint, motions and discovery.**

\* \* \* \* \*

*(c) Motion to dismiss and motion for more definite statement.*

In proceedings governed by this subpart, except as provided in paragraph (d) of this section, no motion to dismiss the complaint or for a more definite statement of the complaint's allegations shall be made, but the substance thereof may be stated in the respondent's answer. The law judge may permit or require a more definite statement or other amendment to any



pleading at the hearing, upon good cause shown and upon just and reasonable terms.

(d) *Failure to provide copy of releasable portion of Enforcement Investigative Report (EIR).* (1) In proceedings governed by this subpart, where the Administrator fails to provide the releasable portion of the EIR to the respondent by the time it serves an emergency or other immediately effective order on the respondent, the respondent may move to dismiss the complaint or for other relief and, unless the Administrator establishes good cause for that failure, the law judge shall order such relief as he or she deems appropriate, after considering the parties' arguments.

(2) The releasable portion of the EIR shall include all information in the EIR, except for the following:

- (i) Information that is privileged;
- (ii) Information that constitutes work product or reflects internal deliberative process;
- (iii) Information that would disclose the identity of a confidential source;
- (iv) Information of which applicable law prohibits disclosure;
- (v) Information about which the law judge grants leave to withhold as not relevant to the subject



matter of the proceeding or otherwise, for good  
cause shown; or

(vi) Sensitive security information, as defined at  
49 U.S.C. 40119 and 49 CFR 15.5.

(3) Nothing in this section shall be interpreted as  
preventing the Administrator from releasing to the respondent  
information in addition to that which is contained in the  
releasable portion of the EIR. Likewise, nothing in this  
section shall be interpreted as preventing the Administrator  
from releasing to the respondent a copy of the EIR prior to  
the issuance of the Administrator's complaint.

Deborah A.P. Hersman,  
Acting Chairman

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